Supreme Court, U. S.
FILED
JUL 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ...

No. 78-43

TED BIRMINGHAM and Wife, MARTHA MAE BIRMINGHAM,
Petitioners,

vs.

FLOYD ALLISON and Wife, VELMA ALLISON, a Partnership
Doing Business as Allison's Restaurant,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of the State of Tennessee

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PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of the State of Tennessee

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Tennessee entered February 2, 1978, and the subsequent denial of a petition for the writ of certiorari handed down by the Supreme Court of Tennessee on April 10, 1978.

OPINION BELOW

The opinion of the Court of Appeals of Tennessee, filed February 2, 1978, and the denial of the petition for the writ of certiorari by the Supreme Court of Tennessee on April 10, 1978, are included herein and made a part of this petition.

JURISDICTION

The judgment of the Court of Appeals of Tennessee affirming the judgment of the trial court was filed February 2, 1978. The Supreme Court of Tennessee denied the petition for writ of certiorari on April 10, 1978. Jurisdiction of this Court is invoked pursuant to Rule 19 of the Rules of the Supreme Court of the United States and under the authority of 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

(a) Was the setting aside of the jury verdict and the granting of a new trial by the trial judge, acting as the thirteenth juror, a **gross** abuse of discretion and judicial power in view of the overwhelming and uncontradicted evidence and proof?

(b) Is the action of the trial judge detailed above reviewable by the appellate courts?

(c) Does the action of the trial judge, detailed above, amount in truth and fact to a denial of the Plaintiff's (Petitioners) right to trial by jury as secured by the Tennessee State Constitution Article 1, Section 6, and Article 6, Section 9, and as guaranteed by the Seventh Amendment of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

(a) Did the action of the trial judge in setting aside the verdict of the jury and granting a new trial in view of all of the facts and circumstances of this case effectively deny the Plaintiffs (Petitioners) of the right to trial by jury secured by the Constitution of the state of Tennessee, and thus violated the due process

clause of the Fourteenth Amendment of the Constitution of the United States?

(b) Should the provisions of the Seventh Amendment of the Constitution of the United States guaranteeing the right to trial by jury in civil cases be extended to the states through the Fourteenth Amendment?

STATEMENT OF THE CASE

On October 8, 1974, complaint was filed in the Circuit Court of Weakley County, Tennessee, for damages arising out of a trip and fall on the premises of Allison's Restaurant in Greenfield, Tennessee, wherein it was alleged that petitioner Martha Birmingham was permanently injured and disabled, the result of defendants' (respondents') common law negligence or failure to exercise due care. The answer denied negligence. Defendants admitted an alleged partnership, Floyd Allison and wife Velma Allison d/b/a Allison's Restaurant, Greenfield, Tennessee, in their answer.

The case was tried before a jury in August, 1975, with a verdict for the plaintiff Martha Birmingham in the amount of $44,050.00 and for her husband, Ted Birmingham, in the amount of $2,751.00.

On December 29, 1975, on Motion for New Trial the trial judge set aside the verdict and judgment, to the great surprise and shock of petitioners (plaintiffs).

The complaint charged negligence for failure to exercise the common law duty of due care; the answer denied negligence. The complaint charged that the bodily injuries received in a trip and fall on the premises of the defendants resulted in serious and permanent bodily injuries, loss of consortium, pain

and suffering, medical expense and other expenses, loss of income, and earning capacity diminished; the answer denied the allegations concerning damages and the nature and extent of the bodily injuries.

The undisputed facts were that on or about October 22, 1972, Martha Mae Birmingham (petitioner) tripped and fell while on the premises of Allison's Restaurant, suffering an "acute back strain", severely and permanently injuring her back. She tripped and fell, catching her left heel in the top of a metallic sewer clean-out drain plug that was in a hole in the concrete pavement about twelve (12) feet from the front door of the restaurant. The hole was uncovered and was full of rain water, surrounding and covering the sewer clean-out plug such that the plug was hidden from view.

Petitioner Martha Birmingham, her sister who was walking with her, and her husband all testified as eyewitnesses to these events and there were no defense witnesses to dispute these facts.

Petitioner Martha Birmingham was carried from the scene in a blanket to a car and eventually to a hospital in Huntingdon, Tennessee, where she received emergency medical treatment and was hospitalized and treated by B. Narayana Bhat, M.D. The hospital emergency room record provided, "stepped in a hole in front of Allison's Restaurant, Greenfield, Tennessee," as her version of the cause of injuries.

She was hospitalized again in November, 1972; then again in July, 1973; then again in 1975, under the care of a neurologist in Memphis, Tennessee at Baptist Hospital.

Both doctors testified by deposition as to the seriousness and permanent nature of the back injuries. Dr. Bhat testified that she had suffered a permanent life-long injury; no bending, stooping, squatting, jumping, lifting, scrubbing or other such

domestic chores; handicapped for life—that she suffered an "acute back strain" in the fall, a permanent disability.

Dr. Jennings, neurologist, testified that she would suffer a permanent injury "the rest of her life unless a miracle." He spoke of "posterior tibial irritation"—of "facets, little feet, nerve irritated." Dr. Jennings testified that this was "nerve root sleeve irritation" caused by the forced bending of the lumbar spine vertebrae—no simple force. These little feet or facets cracked or crushed together—"popping"—as she tripped and fell. He verified the nerve root injury by injecting zyclaine and water into the nerves and by other tests.

Mrs. Birmingham's version of how she tripped and fell, stretching, tearing, bending and popping joints and bones, skinned knees and elbow, head and back pain, was in accord with Dr. Jennings' opinion as to how the snapping back violently, suddenly, swiftly, injured the soft tissues in her lower back, ultimately resulting in nerve irritation in her lower back.

She continued to suffer—pain, vertigo, hearing loss, crying, unable to work, blackouts and fainting. Her complaints to Dr. Jennings included dizziness, nausea, constant low back pain.

She testified as to her medical and transportation expenses. her pain and suffering, diminished earning capacity, loss of income, medicine, and other expenses. Her husband testified as to these expenses—and suffering.

The defense offered no medical proof to the contrary nor any proof or eyewitness testimony to contradict the plaintiff's version of liability—trip and fall. There were no defense witnesses to dispute the version of Martha Birmingham, her sister Mrs. Betty Haywood, a school librarian from Lockport. Illinois. who was walking with her, or Ted Birmingham, her husband. who was waiting in an automobile for the two ladies as they were exiting the restaurant where these three adults and two

Birmingham children had been dining as customers of Allison's Restaurant.

The defense did not offer evidence to establish that the hole was a trivial defect and successfully resisted plaintiffs' motion to inspect the premises and to photograph the hole (or defect) and to obtain engineering data. Efforts to obtain the defense's Polaroid photograph of the hole were also unsuccessful but production of the Polaroid photograph was *forced* at trial.

The defense *claimed* that she "slipped" on the pavement *beside the hole* but there were no defense eyewitnesses who saw her slip and the hospital emergency room record provided [what Mrs. Birmingham told the doctor in agony and pain] "tripped in hole".

The defense did not move for a directed verdict; the defense did not move for summary judgment; the defense did not move for judgment n.o.v. The claim of "trivial defect" was never really raised. Moreover, the trial judge had ruled in the first trial [voluntary nonsuit taken by plaintiff because the sister from Illinois was not available to testify] that the hole was not a trivial defect.

The defense offered no proof to rebut plaintiffs' version of the breach of duty to exercise reasonable care on their premises.

The trial judge on November 20, 1975, granted the new trial on the theory of "thirteenth juror", although there was no "hearing"[1] on such grounds. His Honor simply ruled, granted the new trial, and refused plaintiffs' (petitioners') appeal on the grounds that the ruling was not "final".

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[1] "Wayside" bill of exceptions (3 volumes) was perfected and identified, certified and filed within the time limit prescribed by law as ordered by the Court allowing 90 days under § 27-110 of the Tennessee Code Annotated. There was an extensive hearing on another issue concerning alleged misconduct which was resolved in plaintiffs' favor.

This was the second full-blown jury trial. Petitioners did not want nor could they afford another and perhaps fourth full-blown trial. Petitioners (plaintiffs) filed a motion with affidavit that they were paupers and could not afford another and perhaps fourth trial. The motion sought to have the verdict reinstated and other relief. On April 5, 1976, the suit was dismissed for failure to prosecute. On May 20, 1976, a plaintiff's motion for new trial which removes any doubt about finality was filed and on November 20, 1976, overruled. The matter now being "final" and appealable, His Honor this time granted the appeal prayed for.

The Tennessee Court of Appeals refused to review the appeal holding:

> Where, as here, a trial judge acting as thirteenth juror on a motion for a new trial expresses his dissatisfaction with the jury verdict and awards a new trial, that action is not reviewable by an appellate court. *Holmes v. Wilson*, Tenn. (1977), 551 S.W.2d 682.
>
> This issue being the only complaint made in this Court, we dismiss this appeal and affirm the judgment of the trial court. The cost in this Court is adjudged against the appellants, for which execution may issue if necessary.

Thereafter, the Supreme Court of the State of Tennessee on April 10. 1978 denied petitioners' application for Writ of Certiorari.

ARGUMENT

At the trial level in Weakley County, Tennessee, the trial judge granted a motion for new trial with regard to the jury verdict of $44,050, and $2,751, as thirteenth juror. On appeal, the Court of Appeals of the State of Tennessee took the position that this action was not reviewable, citing the Tennessee case of *Holmes v. Wilson*, 551 S.W.2d 682 (1977) as authority, and no other cases or authorities. The Tennessee Supreme Court denied certiorari. We contend that the action of the trial judge is reviewable as a *gross* abuse of discretion under the facts of this case and that the action of the trial judge was an invasion of the right to trial by jury as secured in the Constitution of the State of Tennessee and the United States Constitution, Seventh Amendment.

Although under the Seventh Amendment it has been held by this Court in 1916 in the case of *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211 (1916) that the Seventh Amendment is not to be applied to the States by virtue of the Fourteenth Amendment, we are respectfully asking the Court to reconsider this question and to categorically overrule this 1916 decision which we contend is out of step with modern Constitutional law. We respectfully submit that there is no reason to extend all the other provisions that have been extended to the states and to exclude the Seventh Amendment right to trial by jury in civil cases. However, we do not rest solely upon this contention. The constitution of the State of Tennessee expressly provides for the right of trial by jury in civil cases in Article 1, Section 6 and Article 6, Section 9 (see Appendix) and we contend that this right in theory and concept is precisely the same since the roots of both concepts in both constitutions are in the English Common Law.

Under English common law as expressed by Blackstone in his Commentaries (1765-69) the right of trial by jury in civil

cases simply does not allow the granting of a new trial without reason and proper procedure.[2] The Tennessee practice under Tennessee cases has deviated from these roots and has perverted this rule although Tennessee as the other states and the Federal Courts would be bound by the Constitutional test of the right of trial by jury as expressed by Blackstone there being no other authority to the contrary. Under what authority can this rule be changed? To grant a new trial without reason or cause as in a case such as the instant case is an abuse of discretion and an invasion of this right to trial by jury under the Tennessee Constitution—and the Seventh Amendment of the United States Constitution.

To say that this action is not reviewable is to compound the error. Under Federal authority a gross abuse of discretion is reviewable and we maintain that for Tennessee to take the contrary position is to violate the due process clause of the Fourteenth Amendment. The Federal rule is set out in Professor Moore's treatise *Federal Practice*, Volume 6A-59-163, and footnotes, and we contend that this rule and the authorities cited therein, particularly *Lind v. Schenley Industries*, 278 F.2d 79 (3rd Cir. 1960), *cert. denied*, 364 U.S. 835 (1960) is directly in point: in *Lind* the trial judge was guilty of the same misconduct as the

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[2] Granting a new trial, under proper regulations, cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a re-hearing of the cause before another jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other: and the subsequent verdict, though contrary to the first, imports no title of blame upon the former jury; who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject: and nothing is now tried but the real merits of the case.

A sufficient ground must, however, be laid before the court, to satisfy them that it is necessary to justice that the case should be farther considered. If the matter be such, as did not or could not

trial judge in the instant case, and we maintain that there is no distinction. The Federal decisions *Stancill v. McKenzie Tank*, 497 F.2d 529 (5th Cir. 1974); *Reed Brothers v. Monsanto*, 525 F.2d 486 (8th Cir. 1975); *Spurlin v. General Motors*, 528 F.2d 612 (5th Cir. 1976); *Duncan v. Duncan*, 377 F.2d 49 (6th Cir. 1967); *Turner v. United States*, 229 F.2d 944 (6th Cir. 1956), cert. denied 351 U.S. 970 (1956); and other cases cited in *Moore* stand for this proposition that gross abuse of discretion is reviewable. We know of no United States Supreme Court decision directly in point.

Common sense and reason support such a conclusion. What is the *right* to trial by jury if the judge can grant a new trial as Tennessee has construed without giving any reason and saying that if he does give reasons and they are wrong that makes no difference? Obviously these Tennessee cases, *Mize v. Skeen*, 63 Tenn. App. 37, 468 S.W.2nd 733 (1971), and those cases upon which such a theory is built are wrong.

Finally, under the Fourteenth Amendment we contend that the trial judge is in error because the record shows that as a matter of fact he violated the Tennessee rule reversing the case because he was dissatisfied with the *amount* of the verdict which

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appear to the judge who presided at *nisi prius*, it is disclosed to the court by *affidavit:* if it arises from what passed at the trial, it is taken from the judge's information; who usually makes a special and minute report of the evidence. Counsel are heard on both sides to impeach or establish the verdict, and the court give their reasons at large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are, upon full deliberation, clearly explained and settled.

Nor do the courts lend too easy to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case.

pp. 391-392, Tucker Edition.

he cannot do under Tennessee law. He can reverse only if he is dissatisfied with the *fact* of the verdict. This Tennessee rule is clearly stated in *Turner v. Turner*, 85 Tenn. 389, 3 S.W. 121 (1887) and *Tennessee C. & R. R. Co. v. Roddy*, 85 Tenn. 403, 5 S.W. 286 (1887). Certainly this is a violation of due process. This Tennessee rule was ignored by the trial judge, the Tennessee Court of Appeals, and in effect, the Supreme Court of the State of Tennessee by denial of the Petition for Writ of Certiorari.

We respectfully submit that it is the facts of this case which bring it so sharply and clearly into focus as violating constitutional law. The Court of Appeals of Tennessee shirked its responsibility by citing dictum in a Tennessee Supreme Court decision *Holmes v. Wilson*, 551 S.W. 2nd 682 (1977) [cited supra at p 7], refusing to review perhaps the grossest abuse of discretion one could imagine. This is indeed an illustration that facts are stranger than fiction. In the instant case the Plaintiff injured in the fall, her sister, a school teacher from Illinois, walking with her, and the husband-Plaintiff all testified as to the trip and fall and these factual matters were not denied by one single defense witness and cross-examination did not reveal anything except the truth of the Plaintiff's allegation—negligence. The damages claimed by the Plaintiffs, supported by their testimony was established by the medical records and hospitalizations, particularly an emergency room record on the night of the fall, as well as the testimony of the treating physician, a medical doctor, and most importantly, the testimony of a neurologist in Memphis, Tennessee, as to the nature and extent of the back injuries being permanent, all of which was uncontradicted by the defense with other medical testimony or by cross-examination. The plaintiff, Martha Birmingham, was seriously and permanently injured for life, and pitifully a cripple as a result of the careless acts and negligence of the defendants.

CONCLUSION

Petitioners contend that the jury verdict ought to be reinstated by this court in the amount of $44,050.00 and $2,751.00 or at least the action of the Tennessee Court of Appeals ought to be rectified by a holding by this Court that such actions are reviewable as a matter of Constitutional law.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of Court of Appeals, Western Section at Jackson

Opinion filed: February 2, 1978.

Matherne, J.

The plaintiffs attempt to appeal from an order of the trial court which granted the defendants a new trial. The only assignment of error is that the trial judge erred in granting the new trial. The defendants filed a motion in this Court to dismiss the appeal.

I

This lawsuit grew out of personal injuries received by Mrs. Birmingham when she allegedly tripped and fell outside the premises of the defendants. In the first trial the plaintiff took a voluntary nonsuit. At the second trial the jury awarded Mrs. Birmingham $44,050 and her husband $2,751. Thereafter, the trial judge granted the defendants' motion for a new trial. A wayside bill of exceptions was properly filed, but a new trial was never had.

After the new trial was granted, the plaintiffs filed a motion asking that the trial court set aside the order granting a new trial and reinstate the verdict. In this motion the plaintiffs state: "(t)hat they do not desire to prosecute the cause any further if the verdict is not reinstated and do not intend to prosecute the cause any further if the verdict is not reinstated. . . ." The trial judge overruled the motion, and the defendants orally moved the court to dismiss the lawsuit for failure

to prosecute. The defendants' motion to dismiss was taken under advisement, and the plaintiffs were allowed two weeks within which to withdraw their written and oral statements that they would not prosecute the cause any further. About three weeks later, the plaintiffs having failed to change their position as to a retrial, the trial court granted the defendants' motion and dismissed the lawsuit. The plaintiffs then moved for a new trial stating as follows:

> Come the plaintiffs and move the Court to allow them a new trial on the merits of this cause. A Wayside Bill of Exceptions has been filed pursuant to Section 27-110, Tennessee Code Annotated, and their objections to the Court's action in setting aside the previous verdict in this cause are thereby preserved.

The trial judge overruled that motion for a new trial as filed by the plaintiffs. The plaintiffs do not complain in this Court about the overruling of their motion for a new trial.

Where, as here, a trial judge acting as thirteenth juror on a motion for a new trial expresses his dissatisfaction with the jury verdict and awards a new trial, that action is not reviewable by an appellate court. *Holmes v. Wilson* (Tenn. 1977), 551 S.W.2d 682.

This issue being the only complaint made in this Court, we dismiss this appeal and affirm the judgment of the trial court. The cost in this Court is adjudged against the appellants, for which execution may issue if necessary.

Nearn, J. (Concurs)

Summers, J. (Concurs)

APPENDIX B

Judgment of Court of Appeals, Western Section at Jackson

This cause came on to be heard upon the appeal of the plaintiffs-appellants from the judgment of the trial court, upon the assignment of error filed by appellants, the brief in support thereof, the Motion to Dismiss filed by appellees, and the brief filed by the appellees, oral argument of counsel, and upon the entire record in the cause, from all of which it appears to the Court that the judgment of the trial court is in all respects proper and correct and should be affirmed.

It Is Therefore Ordered that the appeal be and hereby is dismissed and the judgment of the trial court be and hereby is affirmed. Costs of the appeal are adjudged against appellants, for which execution is awarded, if necessary.

Enter: 2/14/78

/s/ J. MATHERNE
Judge

Approved for Entry:

EDWARD WITT CHANDLER
Attorney for Plaintiffs-Appellants

HOMER BRADBERRY and JOHN F. KIZER
By: /s/ JOHN F. KIZER
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APPENDIX C

In the Supreme Court of Tennessee
At Jackson

Ted Birmingham and Wife, Martha Mae Birmingham,
Petitioners,
vs.
Floyd Allison and Wife, Velma Allison, a partnership, doing business as Allison's Restaurant,
Respondents.
} Weakley Law

IN RE: **Petition for Writ of Certiorari of Ted Birmingham and Wife Martha Mae Birmingham**

(Filed April 10, 1978)

Upon consideration of the petition and brief in support thereof of Ted Birmingham and wife, Martha Mae Birmingham, the reply brief of Floyd Allison and wife, Velma Allison, the Amendment to Petition of Ted Birmingham and wife, Martha Mae Birmingham, the opinion of the Court of Appeals and the record in the cause,

Finding no error in the Court of Appeals the writ is denied at the cost of petitioners.

PER CURIAM

APPENDIX D

Constitution of the United States

Amendment Seven

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Amendment Fourteen

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

Constitution of the State of Tennessee

Article I, Section 6

That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

Article 6, Section 9

The Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.

Supreme Court, U. S.
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a Partnership Doing Business as Allison's Restaurant,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF TENNESSEE

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IN THE

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF TENNESSEE

I

QUESTIONS PRESENTED

The questions presented are: (a) Was the setting aside of jury verdict and the granting of a new trial by the trial judge, acting as the thirteenth juror, a "gross" abuse of

discretion and judicial power in view of the overwhelming and uncontradicted evidence and proof?

(b) Is the action of the trial judge detailed above reviewable by the appellate courts?

(c) Does the action of the trial judge, detailed above, amount in truth and fact to a denial of the Plaintiff's (Petitioners) right to trial by jury as secured by the Tennessee State Constitution Article 1, Section 6, and Article 6, Section 9, and as guaranteed by the Seventh Amendment of the Constitution of the United States?

II

STATEMENT OF THE CASE

Respondents are unable to accept the statement of the case as set out in the brief of Petitioners. Briefly stated, Petitioner Martha Mae Birmingham and her husband, Ted Birmingham, went to Allison's Restaurant in Greenfield, Tennessee, owned by Respondents, for dinner on the evening of October 24, 1972. It was a dark, rainy night. As they left the restaurant, Mrs. Birmingham fell on the pavement outside.

Petitioners allege in their complaint that Mrs. Birmingham tripped and fell by catching the heel of her shoe in a hole, located about twelve (12) feet from the front door, which was used as a cleanout drain capped with a metal plug. They alleged that the Allisons were guilty of negligence in allowing a dangerous condition to exist on the premises, and that Mrs. Birmingham's fall and resulting injuries were directly caused by such dangerous condition. The "hole" had existed on the restaurant property without incident for about fourteen (14) years.

Respondents' answer denied the allegation of negligence; alleged that the "hole" was only a trivial condition, and that Mrs. Birmingham knew of its existence and was guilty of proximate contributory negligence.

The first trial ended in a non-suit on Petitioners' motion made just before the jury was instructed by the Court.

A second complaint was filed alleging substantially the same acts of negligence, and the Allisons interposed substantially the same defenses. At the second trial, the jury returned a verdict for Mrs. Birmingham in the amount of Forty-Four Thousand Fifty & no/100 Dollars ($44,050.00), and for her husband in the amount of Two Thousand Seven Hundred Fifty-One & no/100 Dollars ($2,751.00).

Respondents' motion for a new trial was granted.

A motion to reconsider, filed by the Petitioners, accompanied by their sworn statements, informed the Court that they did not wish to retry the case, but requested only a reinstatement of the jury's verdict. Counsel for the Petitioners, with Mr. Birmingham present, stated in open Court that he thought it fitting that the Court dismiss the case for failure to prosecute as the same would not be retried. Whereupon, Respondents moved for dismissal for failure to prosecute and after taking the motion under consideration for three weeks, and the Court not having been advised otherwise by Petitioners' counsel, sustained the motion and dismissed the case for failure to prosecute.

By still another motion, Petitioners did request a new trial, but the Court overruled the same and granted an appeal. No assignment complained of this order.

A wayside bill of exceptions was timely filed by Petitioners but no other trial was ever had.

Petitioners contended in the Court of Appeals that the jury verdict should be reinstated since the action of the trial judge in granting a new trial as the thirteenth juror violated the constitutional mandate of a trial by jury.

The Court of Appeals of Tennessee, Western Section, at Jackson, dismissed the appeal (Pet. App. A-1-A-3).

By per curiam memorandum opinion, the Supreme Court of Tennessee denied the petition for writ of certiorari (Pet. App. A-4).

III

ARGUMENT

This case presents an anomoly. Petitioners allege a denial of constitutional rights to a jury trial after steadfastly refusing to follow Tennessee practice for appellate review to correct the errors of which they complain.

As the thirteen (13th) juror, the trial judge set aside the verdict of the jury and granted a new trial on three grounds: (1) Misconduct of the jury; (2) The verdict of the jury is contrary to the law and the evidence; and, (3) The verdict of the jury is contrary to the weight of the evidence. (Technical Record pp. 32, 33; See Appendix)

At common law there is no appellate review of an order granting a new trial. Since 1875, by statute, Section 27-108, *Tennessee Code Annotated*,[1] Tennessee appellate courts are required to review the trial judge's action in granting or denying a new trial. However,

1 "Erroneous ruling on new trial. It shall be lawful for the appellant to assign for error that the judge in the court below improperly granted or refused a new trial therein, and the appellate court shall have power to grant new trials, or to correct any errors in granting or refusing the same."

Tennessee has uniformly held that no appeal would lie until after final judgment. If the new trial is granted, the appealing party must preserve the record of the first trial by wayside bill of exceptions which is reviewable only after the judgment has become final in the successive trial. *Mize v. Skeen*, 63 Tenn. App. 37, 468 S.W. (2d) 733 (1971), and authorities cited therein.

It is the duty of the trial judge to set aside the verdict of the jury if for any reason he disapproves. After an adverse second trial, upon consideration of the wayside bill, first, the Court of Appeals or the Supreme Court of Tennessee could have corrected any of the errors, as alleged and complained of by Petitioners. See *Dykes v. Meighan Construction Co.*, 205 Tenn. 175, 326 S.W. (2d) 135, (1958).

Petitioners refused to retry the case and permitted the trial judge to enter an order of dismissal for failure to prosecute. Later, the trial judge overruled a subsequent motion for a new trial filed by Petitioners and granted an appeal. This did not address itself to the merits of the controversy, nor did it represent any change in the trial judge's disapproval of the jury verdict, but was the crutch used by Petitioners to reach the Court of Appeals in the first place. No error was assigned to the action of the trial court in dismissing the case, nor in overruling the last motion for a new trial. Petitioners only sought to have the Court of Appeals reinstate the jury verdict by circumventing long established Tennessee practice.

Petitioners seek relief here by asking this Honorable Court to overturn the rules of appellate practice existing in Tennessee for more than a century.

Petitioners were not denied a trial by jury. They refused every opportunity afforded for appellate review, and thereby closed the courthouse doors on this case. The questions they present are frivolous and unworthy of consideration.

CONCLUSION

The writ should be denied.

Respectfully submitted,

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Counsel for Respondents

Appendix

APPENDIX A

ORDER OF TRIAL COURT GRANTING THE MOTION FOR A NEW TRIAL (Technical Record pp. 32, 33)

IN THE CIRCUIT COURT OF WEAKLEY COUNTY, TENNESSEE

TED BIRMINGHAM AND WIFE MARTHA MAE BIRMINGHAM, PLAINTIFFS,	)	CIVIL ACTION NO. 4398
v.	)	
FLOYD ALLISON AND WIFE, VELMA ALLISON, a partnership, d/b/a ALLISON'S RESTAURANT, DEFENDANTS	)	

ORDER

This cause came on to be heard on this the 20th day of November, 1975, before the Honorable Phil B. Harris, Circuit Judge, on a Motion for a New Trial by the defend-

ants, Floyd Allison and wife, Velma Allison, the testimony of witnesses heard in open Court, argument of counsel and the entire record in the cause.

From all of which the Court finds that the motion should be sustained, because:

1. One, or more, members of the jury was guilty of misconduct in commenting on matters dehors the record, overheard by the Court, as the jury was retiring from the court room on one occasion during the trial, which, in the opinion of the Court, could have affected the results of the trial.

2. The verdict of the jury is contrary to the law and the evidence.

3. The verdict of the jury is contrary to the weight of the evidence.

IT IS THEREFORE ORDERED that the verdict herein, and the judgment entered thereon on the ___ day of August, 1975, be and they are hereby set aside and vacated, and a new trial is granted, the costs of the trial to abide the event of the action.

Plaintiffs moved to be allowed a direct appeal from the Court's ruling, which motion the Court overrules and disallows.

To all of which action of the Court, plaintiffs except and are allowed ninety (90) days within which to prepare and file a Wayside Bill of Exceptions.

Enter this 29th day of December, 1975.

/s/ Phil B. Harris
Circuit Judge